



BOARD OF INQUIRY (*Human Rights Code*)

Library.

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by April Grainger dated February 24, 1992, alleging discrimination in employment on the basis of sexual harassment and sexual solicitation by Pic Para Legal Services and Vern Pickard.

B E T W E E N :

Ontario Human Rights Commission

- and -

April Grainger

Complainant

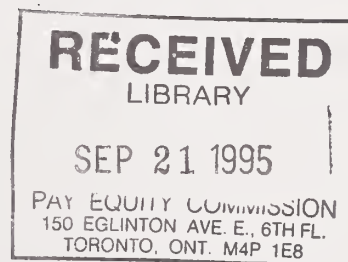
- and -

Pic Para Legal Services, a division of 795430 Ontario Inc.
Vern Pickard

Respondents

DECISION

Adjudicator : Randolph Mazza
Date : September 15, 1995
Board File No: 94-0021
Decision No : 95-041



Board of Inquiry Decision under the *Human Rights Code*

ONTARIO HUMAN RIGHTS COMMISSION

- and -

APRIL GRAINGER

Complainant

- and -

VERN PICKARD

- and -

PIC PARA LEGAL SERVICES, A DIVISION OF 795430 ONTARIO INC.

Respondents

Date of Complaint: February 24, 1992

Adjudicator: Randolph J. Mazza

Appearances: Ontario Human Rights Commission
Complainant

Margaret Best, Student-at-Law
April Grainger

INTRODUCTION

This hearing comes before the Board of Inquiry (the "Board"), as a result of a complaint filed by April Grainger with the Ontario Human Rights Commission on or about February 24, 1992. The Complainant alleges sexual harassment while she was an employee of the Respondent, contrary to sections 5, 7(2), 7(3)(a) and 9 of the *Human Rights Code* (R.S.O. 1990, c. H19, as amended). Counsel for the Commission on behalf of the Complainant advised that the Complainant would not be proceeding with the allegations of sexual solicitation and reprisal under section 7(3)(b) of the *Code*.

The Complainant was not independently represented by Counsel and chose to have Counsel for the Commission present her case. Neither the Respondent, Pic Para Legal Services, a Division of 795430 Ontario Inc., (the "Corporate Respondent") nor the Respondent Vern Pickard (the "Respondent") appeared in person or by representative. The Board was satisfied, however, that both Respondents were served in compliance with the *Human Rights Code* and, therefore, ruled under section 7 of the *Statutory Power Procedures Act*, R.S.O. 1990, c. 22, as amended (the *SPPA*), that the hearing would take place in their absence.

TESTIMONY OF APRIL GRAINGER

Prior to the testimony of Ms. Grainger, Commission Counsel submitted two exhibits. The first was a brief of documents which was marked as "Exhibit A"; the second was a letter dated July 29, 1991, signed by the Respondent, Vern Pickard addressed to "Worker No. 104" marked as "Exhibit B."

The Complainant gave evidence of her personal history. She is the mother of eight children and presently resides in Etobicoke, Ontario, with her husband Timothy Joseph Knowles.

She received her Grade 12 education in Saskatoon and thereafter obtained her Honours Business Degree from Capilano College, in North Vancouver. The Complainant graduated from University of British Columbia with a Bachelor of Arts in Business Administration. After attending two years at university, she worked at Rogers Cable TV as a secretary and as an accountant on collections of overdue accounts. The Complainant also worked for a company called Sunshine Cleaning Products where her duties consisted of bookkeeping, payroll administration and collections. The time frame of her work history with respect to these two companies was approximately between 1978 and 1985. The Complainant is presently 34 years of age and was diagnosed with Rye's Syndrome, a form of multiple sclerosis, on or about October 26, 1994.

The Complainant testified that she first met Vern Pickard in the Summer 1991 in Etobicoke in the Court House. She indicated that she was there to respond to an action against her for arrears of rent. She stated that Mr. Pickard approached her, nudged her on the arm and said, "What's a cute little thing like you doing down here all by herself?" The Complainant responded by saying: "Excuse me, sir, but like I'm busy. I'm married, please go away." The Respondent then showed her some identification, said he meant no offence and that he was offering to assist her with her court proceeding. According to the Complainant, the Respondent entered the courtroom and then returned advising her that he was able to have the case adjourned to enable the Complainant to attempt a settlement with the landlord.

The Respondent asked the Complainant how he could be of assistance to her in resolving her outstanding court action. The Complainant inquired as to the Respondent's costs for his services, and the Respondent replied that he and the Complainant would discuss the cost after the Complainant responded to some of his questions about her work history. A brief discussion ensued during which the Respondent advised the Complainant that he was a property manager for a number of buildings in Toronto, Hamilton, Kitchener and Welland and that he also operated a licenced collection agency. The only other employees of his company were his wife and his daughter.

Subsequent to the discussion, the Respondent offered to the Complainant a job at \$10.00 per hour, together with a 10% commission of all monies which the Complainant collected for the Respondent from overdue accounts. The Complainant testified that she was ecstatic about the job offer and accepted the job immediately. She started on July 16, 1991.

The Complainant stated that her job consisted of data entry into the Respondent's computer as well as documenting files for small claims court actions, inputting information on rental increases, typing up letters to tenants and advising tenants of rent increases. She was under the direct supervision of the Respondent.

On July 19, 1991, the Complainant was charged with public mischief, taken to 21 Division Police Station in Etobicoke and transferred to the College Park Courthouse for a bail hearing. Mr. Pickard having learned about the charge from the Complainant's cousin, attended at the courthouse, identified himself as the Complainant's employer and posted bail. This was after the Complainant made attempts to locate both her husband and her father to post her bail.

Shortly after July 19, 1991, the Complainant testified that the employer/employee relationship between the Respondent and the Complainant significantly changed. What followed were a series of incidents consisting of sexual comments and gestures initiated by the Respondent and directed at the Complainant which ultimately resulted in the termination of the Complainant's employment.

These incidents are summarized below:

1. On July 19, the Respondent suggested to the Complainant that they discuss her next day's work schedule over a coffee and a doughnut. The Complainant, anxious to return home to her children, who were at that time cared for by her cousin, declined the offer. The Respondent reminded the Complainant that he had just signed a surety for the amount of \$1,000 on her behalf and that she ought not to "push it." It was during this conversation that the Respondent asked the Complainant if she had slept with any other men. The Complainant responded "No, I haven't." To which the Respondent then stated, "Come on, April, you've got six children, a woman with the amount of children you have, you can't tell me that you are not horny all the time."
2. The second incident took place when the Complainant accompanied the Respondent to Kitchener to make arrangements for the establishment of a satellite office. The Respondent stopped at a local department store, left the Complainant in the car, and returned to the automobile with some purchases. The Respondent told the Complainant that he had purchased some clothing for her which he thought would better suit her while she was appearing for the Respondent in court, attending on other matters, or accompanying him.
3. On their return from Kitchener, the Respondent stopped the automobile at a nearby park and the Complainant waited at a picnic table while the Respondent went to purchase some food for lunch. Upon his return, the Respondent sat down beside the Complainant and kissed her on the mouth. The Complainant immediately reacted by asking the Respondent to leave her alone and to take her home immediately. If he refused she would take a bus. The Respondent told the Complainant to "shut up". He reminded her that she had a good job with the company, that she would continue to make good money and that her commissions would substantially increase. The Respondent then asked her if she wanted "to blow it all" by having him revoke her surety. The Complainant said nothing further.
4. The next incident took place after the Complainant and the Respondent returned to the Respondent's automobile after leaving the park in Kitchener. Seated in the driver's side of the automobile, the Respondent said to the Complainant that back in the "30's" and the "40's" young boys

used to try to "cop a feel" from their girlfriends as they were sitting beside them. The Respondent then proceeded to grab the Complainant's leg and breast. The Complainant responded that she was not interested and wanted to go home.

5. When the Complainant and the Respondent arrived at the Complainant's home, the Complainant left the automobile leaving the gift wrapped packages behind. However, the Respondent took the packages from the car and brought them to the Complainant's front door. He handed the packages to her husband and then left.

6. The Complainant opened the packages and found that they contained eight pairs of black and pink underwear, a negligee, a green suede skirt, one or two bottles of perfume, makeup, lipstick, nail polish and a note from the Respondent suggesting that the items of clothing would be more appropriate for her when she accompanied the Respondent. The Complainant stated that she reacted by throwing the gifts and the note into her fireplace and burning them.

7. In the month of August 1991, the Respondent called the Complainant asking her to come to his house the next day to do some computer data input. The Complainant advised the Respondent that she was unable to do so since she was taking two of her children to the African Lion Safari. The Respondent insisted upon accompanying her and arrived at her house the next day unannounced. On their way to the automobile, the Respondent struck the Complainant on the "backside", put his arms around her waist and kissed her on the cheek. When the Respondent, the Complainant and the children arrived at the African Lion Safari, the Respondent purchased a bouquet of flowers for the Complainant, offered them to her and kissed her again on the cheek. The Complainant stated that she did not want the flowers and that they should be going to his wife. The Respondent replied his wife was not there but the Complainant was.

8. In November 1991, the Respondent, having advised the Complainant that he would be attending at the Complainant's home to leave some work, arrived with no work in hand. As the complainant opened the door, the Respondent grabbed her around the waist, swatted her across the buttocks and then grabbed her buttocks. The Complainant lost her balance and fell; the Respondent picked her up and slapped her again on the buttocks and then left. This incident took place in the presence of her husband.

9. On the final occasion, November 28, 1991, the Respondent attended the Complainant's residence asking her to accompany him to pick up some files to do some work. At this time, the

Complainant advised the Respondent that she was seriously thinking of terminating the employment relationship for her own mental stability. The Respondent advised the Complainant that she could not quit and that if she did quit, he would revoke her bail. The Complainant advised the Respondent to leave the premises and before doing so the Respondent slapped her on the buttocks and snapped her bra strap. The Complainant advised that she physically pushed him out the door and locked it behind him.

It was after the November 28th incident, that the Respondent arrived at the Complainant's home, and asked her to return some files. The Complainant's husband asked him to return in fifteen minutes to give the husband and the Complainant an opportunity to gather the files. The Respondent left and returned approximately one half hour later, but this time he was accompanied by the police. The Complainant handed the Respondent the files, the Respondent advised the Complainant that he would be terminating her bail, and he proceeded to do so. However, the police permitted her husband to sign a surety for her.

In describing the psychological impact of the Respondent's sexual comments and aggressive behaviour towards her, the Complainant stated that she felt "like garbage". Further on in her testimony she stated: "Am I a slut because I have children?" When asked if the Respondent took her concerns seriously, the Complainant stated that "He thought they were a joke."

As for the impact on her physical health, the Complainant stated that while she was under Doctor's care for her seventh pregnancy and on medically prescribed medication, for an unrelated matter, her doctor, noticing her stress had increased significantly since she began her employment, increased that medication.

The Complainant testified that she tolerated the Respondent's behaviour towards her for two reasons. Firstly, she feared that if he revoked her bail, as he threatened to do on several occasions, she would lose her freedom and possibly access to her children. Secondly, she hoped that if she stayed, the Respondent would eventually pay her overdue wages.

WAGE LOSS

During the period between July 16, 1991 and November 28, 1991 the Complainant testified that she worked an average of five hours per day and five days per week. According to the Complainant's calculation the total number of hours worked was 424.5 hours. At the hourly rate of \$10.00 per hour the amount owed to the Complainant by the Respondent was \$4,245.00. However, the Respondent

only paid to the Complainant three nominal amounts of money - \$40 in July, \$50 in August and \$68.23 for the month of September. The Complainant was, therefore, obliged to file a wage claim with the Ministry of Labour. The Ministry, unable to verify her rate of \$10 per hour, settled the complainant's claim on a basis of the provincial minimum hourly wage in existence at that time, which resulted in a total award to the Complainant in the amount of \$2,808.00 which included an amount for vacation pay. This amount combined with \$158.23 brought a total amount received by the Complainant to \$2,966.23. This left a balance owing to the Complainant in the amount of (\$1,278.77). ($\$4,245.00 - \$2,966.23 = \$1,278.77$)

TESTIMONY OF TIMOTHY KNOWLES

The Board then heard from the Complainant's husband, Mr. Timothy Knowles. Although Mr. Knowles was not present during all of the incidents and was unclear as to the sequence of events, he did make some observations.

He recalled observing the Respondent slapping the Complainant on the buttocks as she and the Respondent walked to the car on their way to the African Lion Safari. He also testified that he saw the Respondent on the same occasion put his arm around his wife in a very possessive manner. It was on that occasion that Mr. Knowles warned the Respondent to remove his hands from his wife and to desist from any further behaviour in the future. However, Mr. Knowles felt that because he had a previous record of assault convictions, he feared the Respondent might contact the Police if he retaliated, and therefore, Mr. Knowles felt that he was very limited in his effort on behalf of the Complainant.

Mr. Knowles further testified that he recalled seeing the garments purchased by the Respondent for the Complainant, albeit, in two separate packages. One package contained several pairs of underwear and a white blouse and an another package contained "sexy lingerie" and a green suede skirt. Lastly, he recalled that Mr. Pickard did come to the house on November 28 to retrieve his files and revoked the bail.

ADMISSIBILITY OF DOCUMENTARY EVIDENCE

Upon completion of the Complainant's case, the Board was required to determine the admissibility of documentary evidence forwarded to the Registrar in a sealed envelope by the Respondent prior to the commencement of the hearing. The Board, along with counsel for the Commission, reviewed the contents of the envelope and permitted counsel for the Commission to make submissions with respect to the admissibility of the evidence. Counsel agreed to the admissibility of some, but not all,

of the documents. However, the Respondent, who chose to be absent from the hearing, has waived the opportunity of arguing for the admissibility of these documents. Therefore, since the Board has not been convinced that the documentation is admissible under the exceptions to the Hearsay Rule, or in the alternative, admissible under section 15 of the *SPPA*, the Board has no alternative but to render the documents inadmissible.

FINDING OF FACTS

The Board did not have the benefit of the testimony of the Respondent nor did it have the benefit of assessing any challenge, by way of cross-examination, of the Complainant's testimony or the testimony of Timothy Knowles. In these circumstances, therefore, the testimony before the Board is uncontroverted. Further, the Complainant has presented her evidence in a straightforward manner and with conviction and the witness Timothy Knowles has made a genuine effort to recall the evidence to the best of his ability. Since neither the testimony of April Grainger nor the testimony of Timothy Knowles has been discredited, the Board accepts their testimony as a factual accounting of the events.

LIABILITY OF THE RESPONDENT, VERN PICKARD

Sexual Harassment

As stated in section 7(2) of the *Human Rights Code*:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

"Harassment" is defined in section 10(1) of the *Human Rights Code* as follows:

harassment means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

In determining the existence of sexual harassment, the Board must consider the following factors:

1. The perpetrator must be the employer or an agent of the employer.
2. The conduct complained of must amount to a course of comment or conduct.
3. The conduct must be vexatious.
4. The perpetrator must know or ought reasonably to have known that the conduct was unwelcome.

In considering the facts in this particular case, it is clear that all four elements of sexual harassment in the workplace are present.

Firstly, although the evidence indicates that the Corporate Respondent is technically the employer of the Complainant, it is clear the Respondent Vern Pickard was the primary force behind the Corporate Respondent and, therefore, he is clearly the agent of the employer. Secondly, since there are no less than nine separate incidents of verbal comments and physical gestures of a sexual nature, the behaviour of the Respondent, Vern Pickard, amounted to a course of comment and conduct. Thirdly, the vexatious nature of this conduct was demonstrated by the Complainant's continuous resistance of the Respondent's advances. Fourthly, although the *Human Rights Code* requires only the standard of the reasonable person to establish the perpetrator's knowledge of the vexatious nature of the conduct, in this particular case, the Respondent, having been told on several occasions by the Complainant to desist from his behaviour, had **direct** knowledge that this type of conduct was unwelcome. Accordingly, it is the Board's opinion that the Respondent was in violation of section 7(2) of the *Human Rights Code*.

Sexual Discrimination

Section 5(1) of the *Human Rights Code* reads as follows:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap.

Although "sexual harassment" is not a specific item under this section of discrimination, the existing jurisprudence has established that certain forms of sexual harassment will amount to sexual discrimination in the workplace. In the case of *Janzen et. al. v. Platy Enterprises Ltd., Women's Legal Education & Action Fund (LEAF), Intervener* (1989) 59 D.L.R. 4 pg 352, the Supreme Court of Canada concluded on page 379 that sexual harassment is a form of sex discrimination when there exists: "...practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristics related to gender."

It is reasonable to conclude that a male employee would not likely have been subjected to the same disadvantage as was the Complainant. Further, there is no doubt that because the Complainant continued to resist the Respondent's suggestive comments and aggressive behaviour, the Respondent implemented a practice which had the effect of limiting the Complainant's conditions of employment.

He created a poisonous environment which appeared to be psychologically and emotionally unhealthy for the Complainant. This environment was clearly manifested in the Complainant's feeling of low self worth and her increased stress which required an increase in her medication. In addition, the Complainant's employment opportunity was severely limited, if not non-existent. Not only was the Complainant deprived of making a good income contrary to what was stated by the Respondent, but she was denied her earned wages for the entire five-month period of her employment.

The Board, therefore, finds that the Respondent Vern Pickard, in his capacity as an agent for the employer, was in contravention of section 5(1) of the *Human Rights Code*.

Sexual Solicitation

Section 7 (3) (a) of the *Human Rights Code* reads as follows:

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making a solicitation or advance knows or ought reasonably to know that it is unwelcome; ...

Firstly, based on the Board's discussion under the heading of sexual harassment, there is no doubt that the Respondent's behaviour amounted to sexual solicitation or advance. Secondly, as for the standard of knowledge of the reasonable person referred to in this section, the Board has already concluded that the Respondent had direct knowledge that his behaviour was unwelcome.

Thirdly, with respect to the third major element of this particular offence under the *Code* i.e., the perpetrator being in a position to grant or deny benefit, the Respondent, Vern Pickard being an agent for the employer, was in a position to grant or deny to the Complainant a benefit, which in this case, were her wages. Further, Vern Pickard also assumed the responsibility of being the Complainant's bondsperson. Therefore, he was in the dominant position of maintaining or revoking the Complainant's surety. It is within the context of these two positions of power, knowing that he had complete control over the Complainant's livelihood and freedom, that the Respondent took advantage of the Complainant's vulnerability. As long as the Complainant rejected the Respondent's sexual advances, he refused to pay her wages as an employer and threatened her freedom as her bonds person. In the Board's view, there is no doubt that the Respondent was in violation of section 7(3)(a) of the *Human Rights Code*.

CORPORATE LIABILITY

The Board, having made a finding against the Respondent Vern Pickard, personally, the next issue to be determined is whether or not the Corporate Respondent Pic Para Legal Services, a Division of 795430 Ontario Inc. is jointly and severally liable with the Respondent Pickard.

Under the *Human Rights Code*, section 45 places certain limitations on corporate liability.

Section 45 reads:

For the purpose of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 44(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employer's organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

Section 45 exists for the purpose of protecting corporations who do not have control nor who can reasonably expect to have control over an employee whose actions may amount to violations of the *Human Rights Code*. This means that although the employee perpetrator may be held in contravention of the *Code*, personally, there are instances in which the size of the corporation may create such a 'distance' between the offending employee and the person or persons responsible for the direction of that corporation as to permit that corporation to avoid liability.

However, section 45 cannot be used as a shield by a Corporation, where the offending employee is also part of the directing mind of the Corporation (see *Wei Foo v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797 (Ont. Board of Inq.), *Shaw v. Levec Supply Ltd.* (1981) 14 C.H.R.R. D/36 (Ont. Board of Inq.), *Janzen et al., supra*, *Robichaud v. The Queen* (1987) 40 D.L.R. (4th) 577 (S.C.R.)).

In this case, the evidence shows that Vern Pickard and the Corporate Respondent are one and the same. He is clearly the sole directing mind of the corporation; his actions were clearly work-related; and his opportunity to harass the Complainant sexually was directly related to his role as the directing mind of the corporate employer. In that capacity, the Respondent had the responsibility to ensure a wholesome employer/employee relationship between himself and the Complainant. As the sole directing mind of the Corporate Respondent he shirked that responsibility and abused his position of power. Consequently, his actions are the actions of the Corporate Respondent and therefore, the Corporate Respondent is jointly and severally liable with the Respondent Pickard.

INFRINGEMENT UNDER SECTION 9

Section 9 of the *Human Rights Code* reads as follows:

No person shall infringe or do, directly or indirectly, anything that infringes a right under this part.

The Board, having made its previous findings, it follows that the Respondents were in violation of section 9 of the *Human Rights Code*.

DAMAGES

Wage Loss

Although the Ministry of Labour awarded the Complainant the amount of \$2808.00 including vacation benefits based on a \$6.00 per hour rate, the Board has concluded that the Complainant has satisfactorily established that she was hired by the Respondent at a rate of \$10.00 per hour. The Board is also satisfied that but for the sexual harassment, the Complainant would have stayed with the Respondent until February 1, 1992 at which time she took maternity leave. Accordingly, the Complainant will have her wage loss at the rate of \$10.00 per hour up to and including February 1, 1992 less the amount which she has already collected. Therefore on a basis of an average working day of 5 hours, the amount owing to the Complainant by the Respondent is calculated as follows:

- From July 16, 1991 to November 28, 1991 = $424.5 \times 10 = \$4,245.00$
- Amount paid out to the Complainant by the Respondents pursuant to the Ministry of Labour order = $\$2,808.00 + \$158.23 = \$2,966.23$.
- Amount owing to the Complainant from July 16, 1991 to November 28, 1991 = $\$4,245.00 - \$2,966.23 = \$1,278.77$.
- Additional amount owing to the Complainant from December 1, 1991 to February 1, 1992 = $200 \text{ hours} \times 10 = \$2,000.00$.
- Vacation pay, which is calculated at 4% = \$131.15
- Total amount owing to the Complainant by the Respondent = $\$1,278.77 + \$2,000.00 + \$131.15 = \$3,409.92$.
- Pre-judgement and post-judgement interest is to be calculated on that amount in accordance with the *Courts of Justice Act*, R.S.O. 1990, C.43 as amended.

The Complainant gave no evidence as to the amount of commission owed to her for collection.

Infringement and Mental Anguish

Section 41(1)(b) of the *Code* provides:

- (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order, ...
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

Section 41(1)(b) provides for two categories of compensation: the first category provides for compensation for the infringement itself; and the second category provides for compensation for mental anguish where the perpetrator has engaged in the infringement in a wilful and reckless manner.

(a) *The First Category*

In assessing the amount to be awarded under this category, it is the obligation of the Board to assess an amount which realistically reflects the serious nature of the discrimination and upholds the principles which have been established by the *Human Rights Code*. (See *Morgoch v. Ottawa (City)* 2 (1989) 11 C.H.R.R. D/80 (Ont. Board of Inq.), also see v. *Underwood Board of Commissioners of Smith Falls* (1985), 7 C.H.R.R. D/3176 (Ont. Board of Inq.)

There is no doubt that the Respondents' behaviour toward the Complainant was motivated by her gender and there is no doubt that the Respondent not only violated the Complainant's right to be free from that infringement because of her gender. The Complainant testified that the Respondent's actions made her feel like "garbage" and she stated that she was made to feel as though she was a "slut" because she had children. Her suffering was genuine and continuous, even resulting in increased medication. In considering all the circumstances including the length of time during which the violation persisted, i.e. approximately five months, the Board assesses the damages against the Corporate Respondent and the Respondent Vern Pickard in the amount of \$2,000.

(b) *Second Category*

The second category which allows compensation to a maximum amount of \$10,000.00, is invoked, where the Board is satisfied that the conduct of the Respondent was 'wilful' or 'reckless'.

The leading case on this issue is *Re York Condominium Corp. No. 216. and Dudnik* (1991) 79 D.L.R. (4th) 161 (Ont. Div. Ct.).

In considering the Board of Inquiry's interpretation that "wilfully" meant "intentionally", "knowingly", or "deliberately", the Divisional Court stated as follows:

To the extent that the Board appears to treat "wilfully" and "intentionally" as being synonymous I cannot agree. In my opinion, while the act upon which it is founded must be intentional, the infringement must be the purpose of that act in order to be wilful within the meaning of section 40(1)(b) [now section 41(1)(b).] [at p. 176]

As quoted by Professor Backhouse in the case of *Edward Roberts v. Her Majesty the Queen in the Right of Ontario* (Ministry of Health) (July 4, 1995) (Board of Inq.) (unreported decision):

What is exactly meant by the phrase that "the infringement must be the purpose of that act" will require additional interpretation as the cases present themselves.

Since the Board can never know what was in the Respondent's mind during the course of his behaviour towards the Complainant, the Board is of the opinion that the wilfulness of the act within the context of the interpretation given it in the *York Condominium Case*, can be determined by the nature of the behaviour. In this particular case, the Respondent's behaviour was severe. It was aggressive and direct; he subjected the Complainant to humiliation, indignities and deterioration of her self-worth. In the Board's opinion, he clearly knew the anxiety he caused her by continuously threatening to revoke her surety if she continued to resist his advances, and by withholding her wages. He took full advantage of her vulnerability to satisfy his own personal needs.

By displaying such direct behaviour, it is hard to imagine that the Respondent was not only aware that his acts were infringing upon the Complainant's rights to be free from sexual harassment because of her gender, he was also aware that he was wilfully infringing upon that right.

Even if the elements of the 'wilful act' could not be established under section 41(1)(b), there is ample evidence to suggest that the Respondent was at least 'reckless.' It is important to note that section 41(1)(b) suggests that mental anguish can be established where the Respondent is either "wilful" or "reckless."

The word "reckless" as defined in the Shorter Oxford English Dictionary, 3rd ed. means: "careless of the consequences of one's actions; heedless; lacking in prudence or caution."

In reviewing the case law the Board concludes that the most appropriate definition of reckless within the civil, as distinguished from the criminal context, is best stated by Lord Diplock in *R. V. Lawrence*, [1982] A.C. 510 as ... "The doer of the act is acting 'recklessly' if before doing the act, he either fails to give any thought to the possibility of their being any such risk ... or, having recognized such risk, he nevertheless goes on to do it."

Since there is no element of "deliberateness" or "specific intent", this definition suggests that the standard to establish "reckless" behaviour is less onerous than the standard to establish wilful behaviour under this category. Although the Board of Inquiry and the Divisional Court in the *York Condominium Case* concentrated on the definition of "wilful act" in the establishment of mental anguish, they gave no consideration to the application of the word "reckless" as an alternative.

In this case, the Board is of the opinion that, even if the Respondent were to challenge the Board's conclusion that his act was wilful, the Respondent's behaviour falls within both the English definition and legal interpretation of the word "reckless". His behaviour demonstrated a total lack of "prudence and caution" and he was clearly "careless of the consequences of [his] actions". - the consequences being the violation of the Complainant's rights under the *Human Rights Code*. Further, he either failed to give any thought to the possibility of there being any consequence of his actions or having recognized such consequence, he nevertheless went on to do it.

In this case, the Respondent meets both the test set out for "wilful" as established by the Divisional Court in the *York Condominium Case*. and the test set out for "reckless" as interpreted by this Board. Accordingly, and again considering the time period of the violation, the Board assesses an additional amount of \$1,500 for mental anguish.

ORDER

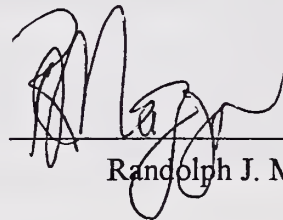
Having found the Respondent Pic Para Legal Services, a division of 795430 Ontario Inc., and the Respondent Vern Pickard to be in breach of the *Human Rights Code*, and having found them to be jointly and severally liable for the losses arising for the infringements of the Complainant's rights, it is hereby ordered as follows:

- (1) The Respondents are to pay the Complainant the sum of \$3,278.77 for wage loss.
- (2) The Respondents are to pay the Complainant the amount of \$2,000.00 for general damages.

- (3) The Respondents are to pay the Complainant the amount of \$1,500 for mental anguish.
- (4) Pre-judgement on the wage loss award will be in accordance with the *Courts of Justice Act*, R.S.O. 1990, C.43 as amended, and will be payable from the date of service of the complaint.
- (5) Post-judgement interest on both the wage loss awards and the damages for infringement and mental anguish will be in accordance with the *Courts of Justice Act*, R.S.O. 1990, C.43 as amended, and will be payable from the date of this decision.
- (6) The Respondents are to provide the Human Rights Commission with a letter of assurance indicating their awareness of the provisions of the *Human Rights Code* and of their intent to abide by those provisions. This letter is to be forwarded to the Commission within 30 days of the date of receipt by the Respondent of a copy of this decision.
- (7) For the next two years the Respondents are to report to Ontario Human Rights Commission the names, addresses and telephone numbers of any female employees who leave his employment. Notification to the Commission is to be made within 2 weeks of the date of departure.
- (8) The Respondent Vern Pickard is to attend a seminar on sexual harassment to be conducted by the Ontario Human Rights Commission or a person acceptable to the Commission at a mutually convenient time and place within six months of the date of receipt by the Respondent of a copy of this decision.

Dated:

Sept. 15/95



Randolph J. Mazza